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Supreme Court of the United States

OCTOBER TERM 1955

No. 266

ARMAND FRED HOEPKER, *Petitioner*

v.

UNITED STATES OF AMERICA

No.

WALTER GAIL THOMAS, *Petitioner*

v.

UNITED STATES OF AMERICA

No.

EDWARD L. SMITH, *Petitioner*

v.

UNITED STATES OF AMERICA

Joint Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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UNITED STATES OF AMERICA

Joint Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

---

TO THE SUPREME COURT OF THE UNITED STATES:

Each petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit affirming the judgment of the United States District Court for the Eastern Dis-

trict of Illinois, convicting each petitioner of a violation of the Universal Military Training and Service Act and sentencing him to the custody of the Attorney General.

OPINIONS BELOW

The opinion of the Court of Appeals is not yet reported. It is printed as Appendix A to this petition (page 13). The opinions of the District Court are reported: *United States* v. *Hoepker*, 126 F. Supp. 118; *United States* v. *Thomas*, 124 F. Supp. 411; *United States* v. *Smith*, 124 F. Supp. 406.

JURISDICTION

The judgment of the Court of Appeals in each case was entered on June 13, 1955. A petition for rehearing was denied on July 14, 1955. (See Appendix C to this petition, page 22, *infra*.) The time for filing this petition for writ of certiorari expires August 13, 1955. This petition for writ of certiorari is filed within the time. The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1). (See also Rules 37(b)(2) and 45(a), Federal Rules of Criminal Procedure.) The District Court had jurisdiction under 18 U. S. C. § 3231.

QUESTIONS PRESENTED

I.

Whether Sections 1660.1 and 1660.20 of the Selective Service Regulations and the local board's order in each case for petitioners to perform civilian work (Thomas at University of Chicago Clinics and Smith and Hoepker at Illinois state hospitals), issued pursuant to such sections, are not authorized by the Universal Military Training and Service Act and are in conflict therewith because the work is private and not public and is not "national" or "federal" as required by the act.

II.

Whether each order to perform civilian work constitutes a construction and an application of the Universal Military Training and Service Act and the regulations that bring them into conflict with the provisions of the Thirteenth Amendment to the United States Constitution because the work is private and not public and is not of "national" or "federal" nature and does not contribute to the "national" welfare.

III.

Whether the order to do civilian work in each case constitutes a construction and application of the act and regulations that bring them into conflict with the provisions of the Fifth Amendment to the United States Constitution because petitioner in each case is being restrained of his liberty without due process of law.

STATUTES AND REGULATIONS INVOLVED

Section 1(c) of the Universal Military Training and Service Act (50 U. S. C. App. § 451(c)) is involved. Also, Section 6(j) of the act must be considered (50 U. S. C. App. § 456(j), 65 Stat. 75, 83, 86). See also Section 12(a) of the act (50 U. S. C. App. § 462(a)).

Section 1660.1 and Section 1660.20 of the regulations (32 C. F. R. §§ 1660.1 and 1660.20) are involved. These are extensive provisions which are printed as Appendix D, *infra*, pages 23.

STATEMENT OF THE CASES

Petitioners were indicted for failure to comply with an order of their local boards directing them to do civilian work contributing to the maintenance of the national health, safety and interest. [Hoepker R. 3-4; Thomas R. 3-4; Smith R. 4-6] Each petitioner pleaded not guilty and waived trial by jury. [Hoepker R. 2; Thomas R. 2; Smith R. 3] The district court found each petitioner guilty and sen-

tenced each to serve a term of two years in the custody of the Attorney General. [Hoepker R. 73, 79; Thomas R. 2, 99; Smith R. 104-105] The trial court wrote an opinion in each case. (*United States* v. *Hoepker*, 126 F. Supp. 118; *United States* v. *Thomas*, 124 F. Supp. 411; *United States* v. *Smith*, 124 F. Supp. 406) The judgments were duly appealed to the Court of Appeals. [Hoepker R. 82-83; Thomas R. 103; Smith R. 106] The Court of Appeals affirmed.—See Appendix A, *infra*, page 13.

Petitioners registered with their local boards and filed classification questionnaires and conscientious objector forms. [Hoepker R. 11-14, 44-51; Thomas R. 33, 43-48; Smith R. 25, 44-52] Each petitioner was ultimately classified by the appeal board as a conscientious objector and thereafter ordered by the local board to report for civilian work. [Hoepker R. 16, 69-70; Thomas R. 60, 74-75; Smith R. 58, 86-87]

Hoepker refused to report for civilian work at the Manteno State Hospital. [Hoepker R. 17, 70-72] Thomas refused to report for civilian work and to perform civilian work at the University of Chicago Clinics. [Thomas R. 76] Smith reported to the Kankakee State Hospital but departed, refusing to perform civilian work. [Smith R. 90-91]

REASONS FOR GRANTING THE WRIT

I.

The key word of Section 456(j) of the Universal Military Training and Service Act and Section 1660.1 of the Selective Service Regulations is "national." This word distinguishes the work contributing to *national* health, safety and interest from private, state, city or county. The word "national" means federal.—28 "Words and Phrases," 21-25; 65 C. J. S. 38-39; *Bouvier's Law Dictionary*, Baldwin's Century Edition, Cleveland, Banks-Baldwin Law Publishing Company, 1940; Webster's *New International Dictionary*, Second Edition, G. & C. Merriam Co., 1950, page 1629.

The courts below take the position in their opinions that Congress did not intend to limit the performance of civilian work to a federal agency. The courts below ignore completely the fact that the provisions of the Universal Military Training and Service Act (50 U. S. C. App. § 456(j), 65 Stat. 75, 83, 86) requiring performance of civilian work by a conscientious objector are almost the same as the provisions of the Selective Training and Service Act of 1940 (50 U. S. C App. §§ 301-318, 54 Stat. 885) for the performance of civilian work by conscientious objectors.

The 1940 law was never construed, applied or interpreted to authorize state or private employment of conscientious objectors. The interpretation of the 1940 law was outstanding for over ten years when the Universal Military Training and Service Act was adopted. The passage of the Universal Military Training and Service Act constituted a re-enactment of the old provisions in the 1940 law about the work to be done by conscientious objectors.

When Congress passed the Universal Military Training and Service Act, re-enacting the old law, Congress thereby approved the administrative interpretation placed upon the 1940 law, which restricted the performance of civilian work by conscientious objectors to federal agencies. The adoption of this administrative interpretation constituted a legislative limitation of the performance of civilian work by conscientious objectors to service only for the federal government or agencies of the federal government. It shows a congressional intent not to allow an extension of the service by conscientious objectors in state or private agencies.

The 1940 law (50 U. S. C. App. §§ 301-318, 54 Stat. 885) in Section 5(g) provided, among other things, as follows:

> "... Any such person claiming such exemption from combatant training and service because of such conscientious objections whose claim is sustained by the local board shall, if he is inducted ... be assigned to noncombatant service ... or

> . . . if he is found to be conscientiously opposed to participation in such noncombatant service, in lieu of such induction, be assigned to work of national importance under civilian direction. . . ."

Sections 652.1, 652.2 and 652.11 of the Selective Service Regulations under the 1940 law provided for the performance of such work in civilian public service camps operated by the Director of Selective Service.

The provisions of the present law (50 U. S. C. App. § 456 (j), 65 Stat. 75, 83, 86) are for the performance of the same kind of work as Congress provided for under the 1940 law. Because of remarks on the floor of Congress by members of the House and Senate that it was intended that the government not operate civilian public service camps, the regulations under the present law did not provide for the maintenance of such camps. The conscientious objector was made liable by regulations for the performance of civilian work in governmental and state agencies.

The Selective Service Regulations interpreting the 1940 law were an outstanding administrative interpretation showing congressional intent when the present law was enacted to confine the civilian work to federal employment, as was the case under the 1940 law. Nothing was said on the floor of Congress, or in the law itself, that authorized state or private employment of conscientious objectors under the law. The outstanding interpretation by officials charged with the administration of the 1940 law, substantially the same as the present law, should be followed. The interpretation of the law requiring federal employment rather than state or private employment received congressional approval when substantially the same provisions of the old law were enacted into the present law without change.

In *Sterrett* v. *United States*, 9th Cir., 1954, 216 F. 2d 659, the court said:

> "Such had been the interpretation of this pro-

vision of the Act of Congress for a period of approximately twelve years. Such interpretations by those charged with the Act's administration are entitled to persuasive weight. *Billings* v. *Truesdell,* 321 U. S. 542, 552; *United States* v. *Alabama Railroad Co.,* 142 U. S. 615, 621; *Luckenbach SS Co.* v. *United States,* 280 U. S. 173, 181; *Louisville & N. R. Co.* v. *United States,* 282 U. S. 740, 757. In other words, the construction of the Act for which the appellants here argue is the same construction which the officers charged with its administration had placed upon it for this considerable period of time.

There is a further reason why we think we must thus construe the Act. When Congress substantially reenacted the provisions of the 1940 Act, the Administrative Regulations thus interpreting and construing the Act and long continued without substantial change will be deemed to have received Congressional approval. It has been said that in similar cases the Regulations have the effect of law. *Helvering* v. *Winmill,* 305 U. S. 79, 83; *United States* v. *Zazove,* 334 U. S. 602, 623; *Hartley* v. *Commissioner,* 295 U. S. 216, 220."

It is respectfully submitted that this rule should be applied here, to outlaw state or private employment by conscientious objectors under the act authorized by the present regulations.

The Court should not find any broader congressional intent for the employment of conscientious objectors under the law than Congress authorized for members of the armed forces. Soldiers were not intended to be farmed out for service of the state governments. There is nothing in the act to indicate that it was intended that conscientious objectors should be farmed out to state or private agencies for service. If a soldier cannot be lawfully transferred to the state government to act as an employee in a state hos-

pital under the law, then by force of the same reason a conscientious objector cannot be ordered to do similar service in state or private hospitals, in the absence of a specific provision in the act itself commanding such service.

Here the courts below have taken the statute and read into it something that is not fairly intended by Congress to be the law. The courts must interpret, not make, the law. Judicial legislation of the character contended by the courts below is not permitted.—Read *United States* v. *Copeland*, D. Conn., 1954, 126 F. Supp. 382.

A substantial question of federal criminal law under the administration of the Universal Military Training and Service Act insofar as it relates to conscientious objectors performing civilian work is here involved. This important question has not been determined but ought to be determined by this Court.

II.

In event it is concluded that the federal statute involved authorizes the local board to command the petitioners to do the civilian work for the private clinic and the state hospitals, then there is presented another important question of federal criminal law under the enforcement of the Universal Military Training and Service Act. It is whether the act and the regulations, as construed and applied, call for a private labor draft for nonfederal purposes, in violation of the Thirteenth Amendment. This important question has not been determined but ought to be decided by this Court.

Congress has the authority to draft men to perform military service. It also has the right to designate some sort of federal work for performance by conscientious objectors. A drafted person cannot be put to work for private industry. (*United States* v. *Copeland*, D. Conn., 1954, 126 F. Supp. 734) A soldier cannot be ordered to do janitor work in the state capitol building. This would not be extraordinary service within the meaning of the Thirteenth Amendment. If a soldier drafted under the law

cannot be ordered to work in the state capitol building or in a private hospital as a janitor, then by force of the same reason a conscientious objector cannot be compelled to do civilian work for a county department of charities. Petitioners were ordered to do institutional work in the private clinic and the state hospitals.

The work that each petitioner was ordered to do was not alternate conscription service for the federal government. The service he was ordered to perform was not exceptional within the meaning of the Thirteenth Amendment. The *Selective Draft Law Cases* (*Arver* v. *United States*), 245 U. S. 366 (1918), are not in point. Also, *United States* v. *Brooks*, S. D. N. Y., 1944, 54 F. Supp. 997, 2d Cir., 1944, 147 F. 2d 134, is not in point. There are numerous similar cases decided by the Courts of Appeals, holding that the performance of work by conscientious objectors in federal civilian public service camps did not violate the Thirteenth Amendment. These cases are not in point, because there the work done was federal and was alternate service, which was exceptional. Here, however, the work is not alternate service, is not exceptional, but is an arbitrary order to do work for a private clinic and two state hospitals, which is not authorized by the Thirteenth Amendment. The act and the regulations and the order in this case conflict with the principles of *Pollock* v. *Williams*, 332 U. S. 4, 7-13 (1944); *Hurd* v. *Hodge*, 334 U. S. 24, 31-32 (1948); *Bailey* v. *Alabama*, 219 U. S. 219; *Taylor* v. *Georgia*, 315 U. S. 25 (1942).

Hodges v. *United States*, 203 U. S. 1 (1906), involved an indictment seeking enforcement of the criminal sanctions clause of the Civil Rights Act. While the dismissal of the indictments was ordered, the court wrote on the subject of "involuntary servitude" words used in the Thirteenth Amendment. The Court said: "The meaning of this is as clear as language can make it. The things denounced are slavery and involuntary servitude, and Congress is given power to enforce that denunciation. All understand

by these terms a condition of enforced compulsory service of one to another. While the inciting cause of the Amendment was the emancipation of the colored race, yet it is not an attempt to commit that race to the care of the Nation. It is the denunciation of a condition and not a declaration in favor of a particular people. It reaches every race and every individual, and if in any respect it commits one race to the Nation it commits every race and every individual thereof."—203 U. S., at pages 16-17.

In considering the argument here made by petitioners under the Thirteenth Amendment this Court overlooked the rule of constitutional law that a constitutional amendment must be interpreted according to its meaning as of the date of its passage. When the amendment became effective the performance of civilian work was not considered to be an exception to the prohibition of the amendment. At that time the only known exceptions to the amendment were: (1) military service, (2) road work, (3) imprisonment and work as punishment for crime, and (4) maritime service. These did not include alternate service in lieu of military service. It cannot be said that the writers of the amendment contemplated civilian work as an alternative to military service, because induction into service for alternate work was then unknown.

Plainly, therefore, the Thirteenth Amendment did not contemplate civilian work in lieu of military service as an exception. Since it was not an exception, the performance of it is, consequently, prohibited by the Thirteenth Amendment.

It is submitted that a substantial question is involved as to whether the act, the regulations and the order violate the Thirteenth Amendment. This question has not been heretofore determined by this Court, but it ought to be settled by the Court's granting the writ of certiorari in this case.

III.

The decision of the court below is in conflict with Ex

parte *Mitsuye Endo,* 323 U. S. 283, 299 (1944). Compare Ex parte *Milligan,* 4 Wall. 2, 120-121 (1866); and *Cummings* v. *Missouri,* 4 Wall. 277, 325 (1866).

A selective service case deemed worthy of mention on this question is *United States* v. *Emery,* 2d Cir., 1948, 168 F. 2d 454. The prosecution was under the 1940 Act for a conscientious objector's leaving detached service "for which he had volunteered." He had previously been hired out as a volunteer laborer from a Civilian Public Service Camp "to do private dairy herd testing." The prevailing wages for this farm-out laborer were paid to his employer, the federal government. Out of his wages he was paid the $15-a-month Civilian Public Service Camp allowance by the federal government. The balance of his wages was paid into a separate fund of the United States Treasury.

Petitioners were not volunteers. The *Emery* case (168 F. 2d 454) is not in point. It is to be noted that the United States Court of Appeals for the Second Circuit held that, as to the wages paid the defendant, his rights under the First and Fifth Amendments had not been violated. The court, at 168 F. 2d 454, page 456, said ". . . The conscientious objector cannot refuse to perform his work of national importance even if he thinks he is being underpaid and acts on conscientious scruples to avoid what he considers the status of contract labor." The language was dictum since the defendant was in no position to assert the defenses, because he had volunteered for the work he later questioned. Had it been without his consent the case would have been different. Also, the points on forced labor were not presented in that case, as they have been here, which distinguishes that case.

It is submitted that inasmuch as each petitioner in this case did not consent to the work and since he was ordered to do work not in the "national" or "federal" interest or welfare, as distinguished from "private," "state" or "local" welfare, and because the work was against his wishes, it is plain that he has been deprived of his rights, contrary to

the due-process clause of the Fifth Amendment to the United States Constitution.

There is a conflict between the holding by the court below and decisions of this Court on this point. In the event the Court fails to find a conflict, it is submitted that there is involved an important question of federal law that has not been determined but that ought to be decided by this Court.

CONCLUSION

For the reasons above stated it is respectfully submitted that this petition for a writ of certiorari should be granted.

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Counsel for Petitioners

July, 1955.

APPENDIX A

OPINION OF COURT BELOW

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

OCTOBER TERM, 1954, APRIL SESSION, 1955.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
No. 11336. *vs.*
ARMAND FRED HOEPKER,
Defendant-Appellant.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
No. 11337. *vs.*
WALTER GAIL THOMAS,
Defendant-Appellant.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
No. 11346. *vs.*
EDWARD L. SMITH,
Defendant-Appellant.

Appeals from the United States District Court for the Eastern District of Illinois.

June 13, 1955.

Before DUFFY, *Chief Judge*, LINDLEY, and SCHNACKENBERG, *Circuit Judges*.

LINDLEY, *Circuit Judge*. Defendants were adjudged guilty as charged in separate indictments of violating the Universal Military Training and Service Act, 50 U.S.C.A. App. §§ 451 *et seq.*, in that each had refused to perform certain civilian work to which he had been assigned by his local board.

The facts in all three cases are essentially the same. Each defendant, on his application, was classified I-O, (conscientiously opposed to participation in war), by his local board. This classification obligated him to perform, in lieu of military service, civilian work "contributing to the maintenance of the national health, safety, or interest" in accord with the orders of his local board. Section 6(j), 50 U.S.C.A. App. § 456(j). Acting in pursuance of the provisions of that subsection, as implemented by Selective Service Regulations Secs. 1660.1 and 1660.20, 32 C.F.R. §§ 1602 *et seq.*, the board ordered defendants to report for civilian work as follows: Hoepker, to Manteno State Hospital, Manteno, Illinois; Smith to Kankakee State Hospital, Kankakee, Illinois; and Thomas to University of Chicago Clinics, Chicago, Illinois. Smith reported to the hospital but refused to perform the assigned work. Both Hoepker and Thomas refused to report.

The chief contention of each appellant is that the regulations and the boards' orders to perform civilan [sic] work at the state hospitals and the University Clinics, issued pursuant thereto, are in conflict with the Act, because the work is private and not "national" or "federal." This argument has been repeatedly urged in efforts to upset

orders requiring work in hospitals and other charitable institutions under the control and direction of the several states and their subdivisions, and has been unanimously rejected. *United States* v. *Pomorski,* 125 F. Supp. 68, aff'd. No. 12337 CA-6, April 28, 1955; *United States* v. *Niles,* 122 F. Supp. 382, aff'd. 220 F. 2d 278 (CA-9); *United States* v. *Sutter,* 127 F. Supp. 109; *United States* v. *Copeland,* 126 F. Supp. 734; *United States* v. *Hoepker,* 126 F. Supp. 118; *United States* v. *Kinney,* 125 F. Supp. 322; *United States* v. *Smith,* 124 F. Supp. 406; *United States* v. *Thomas,* 124 F. Supp. 411; *United States* v. *Messerman,* M.D. Pa., 23 L. W. 2449; *United States* v. *Wylie,* N.D. Cal., May 17, 1954; *United States* v. *Olvera,* S.D. Texas, Sept. 3, 1954; *United States* v. *Diercks,* ED., Ill., Sept. 29, 1954. We are convinced that these decisions embody the correct rule governing this question with respect to the appeals of Hoepker and Smith. No purpose would be served by repeating what has been so frequently and so ably stated by other courts.

The question before us on this phase of Thomas' appeal is whether civilian work in a private clinic is authorized under Section 6(j). Section 1660.1(a)(2) of the regulations specifies, as appropriate civilian work, employment in nonprofit organizations engaged primarily in charitable activities for the benefit of the general public "or in carrying out a program for the improvement of public health or welfare * * * when such activity or program is not principally for the benefit of the members of such organization * * * or for increasing the membership thereof."

This administrative definition, we think, constitutes a valid exercise of the discretion vested in the President to outline a program of civilian work "contributing to the maintenance of the national health" and welfare. Congress has declared that maintenance of the mental and physical health of our population is a subject of vital federal concern in times of emergency. And Section 6(j), which contains this declaration of policy, defines appro-

priate employment in terms of the nature of the work to be done, without reference to the control of the institutions to which conscientious objectors may be assigned. The protection of the public health is no less work of national importance whether it is done in an institution controlled by federal or by state authorities or by a private charitable corporation.

The evidence is conclusive that the University of Chicago is a non-sectarian, nonprofit corporation, and that its clinics, to which Thomas was ordered to report for work, minister, on a charitable basis, indiscriminately, to alleviate the physical ills of the general public. In addition to that activity, these clinics, aided by grants of federal funds, carry on extensive research in cancer and other diseases. We hold that this is work of "national" importance which the Act authorized.

United States v. *Sparks,* S.D. Ind., February 11, 1955, is inapposite. There the court held that assignment of a conscientious objector to work in a charitable institution which was sponsored and controlled by a competing religious sect was a restraint on the registrant's freedom of religion in violation of the First Amendment. The decision in *United States* v. *Copeland,* 126 F. Supp. 734, striking down an order assigning a conscientious objector to work for a private charitable institution, turned on the failure of the government to introduce evidence to show whether the corporation was under sectarian or non-sectarian control and to show the nature and scope of the work done. If, as defendant contends, that decision is to be read as holding that assignment to any privately controlled institution is *per se* unauthorized, we are in respectful disagreement.

Defendant's further contentions that the Act, so construed, conflicts with the Thirteenth Amendment and the due process clause of the Fifth Amendment must also be rejected as unfounded. The argument based on the Thirteenth Amendment has been disapproved by several courts.

United States v. *Pomorski,* 125 F. Supp. 68, aff'd No. 12337, CA-6, April 28, 1955; *United States* v. *Niles,* 122 F. Supp. 382, aff'd 220 F. 2d 278 (CA-9); *United States* v. *Sutter,* 127 F. Supp. 109; *United States* v. *Kinney,* 125 F. Supp. 322; *United States* v. *Hoepker,* 126 F. Supp. 118; *United States* v. *Smith,* 124 F. Supp. 406; *United States* v. *Thomas,* 124 F. Supp. 411. We agree with the postulate on which these decisions are based that assignment to a non-federal hospital does not constitute involuntary servitude. In our ardor to preserve individual civil rights pursuant to the mandate of the Constitution, we are prone to lose sight of the duties which every citizen owes his nation and his government under that document. The war power, which is reserved to Congress, encompasses authority to conscript manpower to defend the nation during a national emergency. *Selective Draft Law Cases,* 245 U.S. 366. A necessary correlative is the duty of all Americans to serve when called. The strength and vitality of a nation is measured by a criteria broader than a numerical count of its men-at-arms. On receipt of the I-O classification, by grace of their government, conscientious objectors are relieved from the duty to serve in the armed forces. Since it cannot be successfully argued that Congress lacks power to require military service of all, it has the lesser power to require of registrants who invoke the privilege of exemption by claiming a I-O classification, civilian work calculated to strengthen the nation in times of emergency.

It is of no moment under whose direction the work is done. If it aids in our preparedness, civilian service is not open to challenge as involuntary servitude. We need only state the analogy sought to be drawn between the work to which these defendants were assigned and assignment to Macy's basement to demonstrate that the analogy in fact does not exist.

The contentions based on the Fifth Amendment are equally wanting in merit. The objects sought to be attained by the Act are national defense and military pre-

paredness. We believe that what has already been said in this memorandum sufficiently demonstrates that the means selected by Congress, *i.e.*, the assignment of conscientious objectors to work for the protection of the public health, bears a real and important relationship to those objects. We find no denial of due process of law. See *United States* v. *Niles*, 122 F. Supp. 382, 384, aff'd 220 F. 2d 278 (CA-9).

The judgments are

AFFIRMED.

APPENDIX B

JUDGMENT OF COURT BELOW

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Monday, June 13, 1955

Before:

Hon. F. Ryan Duffy, Chief Judge
Hon. Walter C. Lindley, Circuit Judge
Hon. Elmer J. Schnackenberg, Circuit Judge

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
vs.
ARMAND FRED HOEPKER,
Defendant-Appellant.
No. 11336

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Illinois, and was argued by Counsel.

On consideration whereof: It is ordered and adjudged by thisCourt that the Judgment of the said District Court in this cause appealed from be, and the same is hereby, affirmed.

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Monday, June 13, 1955

Before:

Hon. F. Ryan Duffy, Chief Judge

Hon. Walter C. Lindley, Circuit Judge
Hon. Elmer J. Schnackenberg, Circuit Judge

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
vs.
WALTER GAIL THOMAS,
Defendant-Appellant.
No. 11337

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Illinois, and was argued by Counsel.

On consideration whereof: It is ordered and adjudged by this Court that the Judgment of the said District Court in this cause appealed from be, and the same is hereby, affirmed.

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Monday, June 13, 1955

Before:

Hon. F. Ryan Duffy, Chief Judge
Hon. Walter C. Lindley, Circuit Judge
Hon. Elmer J. Schnackenberg, Circuit Judge

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
vs.
EDWARD L. SMITH,
Defendant-Appellant.
No. 11346

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Illinois, and was argued by Counsel.

On consideration whereof: It is ordered and adjudged by this Court that the Judgment of the said District Court in this cause appealed from be, and the same is hereby, affirmed.

APPENDIX C

ORDER DENYING PETITION FOR REHEARING

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Thursday, July 14, 1955

Before

Hon. F. Ryan Duffy, Chief Judge
Hon. Walter C. Lindley, Circuit Judge
Hon. Elmer J. Schnackenberg, Circuit Judge

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

No. 11336-37-46 vs.

ARMAND FRED HOEPKER,

WALTER GAIL THOMAS,

EDWARD L. SMITH,
Defendants-Appellants.

Appeals from the United States District Court for the Eastern District of Illinois

It is ordered by the Court that the petition for a rehearing of this cause be, and the same is hereby, DENIED.

APPENDIX D

Statutes and Regulations Involved

Section 1(c) of the Act

Section 1(c) of the Universal Military Training and Service Act (50 U. S. C. App. § 451(c)) provides:

"The Congress further declares that in a free society the obligations and privileges of serving in the armed forces and the reserve components thereof should be shared generally, in accordance with a system of selection which is fair and just, and which is consistent with the maintenance of an effective national economy."—June 24, 1948, ch. 625, title I, § 1, 62 Stat. 604, amended June 19, 1951, ch. 144, title I, § 1 (a) 65 Stat. 75.

Section 6(j) of the Act

Section 6(j) of the act (50 U. S. C. App. § 456 (j), 65 Stat. 75, 83, 86) provides:

"Nothing contained in this title shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. Religious training and belief in this connection means an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal moral code. Any person claiming exemption from combatant training and service because of such conscientious objections whose claim is sustained by the local board shall, if he is inducted into the armed forces under this title, be assigned to noncombatant service as defined by the President, or shall, if he is found to be conscientiously opposed to participation in such noncombatant service, in lieu of such induction, be ordered by

his local board, subject to such regulations as the President may prescribe, to perform for a period equal to the period prescribed in section 4(b) such civilian work contributing to the maintenance of the national health, safety, or interest as the local board may deem appropriate and any such person who knowingly fails or neglects to obey any such order from his local board shall be deemed, for the purposes of section 12 of this title, to have knowingly failed or neglected to perform a duty required of him under this title. Any person claiming exemption from combatant training and service because of such conscientious objections shall, if such claim is not sustained by the local board, be entitled to an appeal to the appropriate appeal board. Upon the filing of such appeal, the appeal board shall refer any such claim to the Department of Justice for inquiry and hearing. The Department of Justice, after appropriate inquiry, shall hold a hearing with respect to the character and good faith of the objections of the person concerned, and such person shall be notified of the time and place of such hearing. The Department of Justice shall, after such hearing, if the objections are found to be sustained, recommend to the appeal board that (1) if the objector is inducted into the armed forces under this title, he shall be assigned to noncombatant service as defined by the President, or (2) if the objector is found to be conscientiously opposed to participation in such noncombatant service, he shall in lieu of such induction, be ordered by his local board, subject to such regulations as the President may prescribe, to perform for a period equal to the period prescribed in section 4(b) such civilian work contributing to the maintenance of the national health, safety, or interest as the local board may deem appropriate and any such person who knowingly fails or neglects to obey any such order from his local board shall be deemed, for the purposes of section 12 of this title, to have knowingly failed or neglected to perform a duty required of him under this title. If after such hearing the Department of Justice finds that his objections are not sustained, it shall recom-

mend to the appeal board that such objections be not sustained. The appeal board shall, in making its decision, give consideration to, but shall not be bound to follow, the recommendation of the Department of Justice together with the record on appeal from the local board. Each person whose claim for exemption from combatant training and service because of conscientious objections is sustained shall be listed by the local board on a register of conscientious objectors."—50 U. S. C. App. § 456(j), 65 Stat. 75, 83, 86.

Section 12(a) of the Act

Section 12(a) of the act (50 U. S. C. App. § 462 (a), 62 Stat. 622) provides:

". . . Any . . . person . . . who . . . refuses . . . service in the armed forces . . .or who in any manner shall knowingly fail or neglect or refuse to perform any duty required of him under or in the execution of this title, or rules, regulations, or directions made pursuant to this title . . . shall, upon conviction in any district court of the United States of competent jurisdiction, be punished by imprisonment for not more than five years or a fine of not more than $10,000, or by both such fine and imprisonment . . ."

Section 1660.1 of the Regulations

Section 1660.1 of the Selective Service Regulations (32 C. F. R. § 1660.1 (E. O. 10328, 17 F. R. 1650, Feb. 22, 1952)) provides:

"*Definition of Appropriate Civilian Work.*—(a) The types of employment which may be considered under the provisions of section 6 (j) of title I of the Universal Military Training and Service Act, as amended, to be civilian work contributing to the maintenance of the national health, safety, or interest, and appropriate to be performed in lieu of induction into the armed forces by registrants who

have been classified in Class I-O shall be limited to the following:

(1) Employment by the United States Government, or by a State, Territory, or possession of the United States or by a political subdivision thereof, or by the District of Columbia.

(2) Employment by a nonprofit organization, association, or corporation which is primarily engaged either in a charitable activity conducted for the benefit of the general public or in carrying out a program for the improvement of the public health or welfare, including educational and scientific activities in support thereof, when such activity or program is not principally for the benefit of the members of such organization, association, or corporation, or for increasing the membership thereof.

(b) Except as provided in subparagraph (2) of paragraph (a) of this section, work in private employment shall not be considered to be appropriate civilian work to be performed in lieu of induction into the armed forces by registrants who have been classified in Class I-O."

Section 1660.20 of the Regulations

Section 1660.20 of the Selective Service Regulations (32 C. F. R. § 1660.20 (E. O. 10328, 17 F. R. 1650, Feb. 22, 1952)) provides:

"Determination of Type of Civilian Work to Be Performed and Order by the Local Board to Perform Such Work.—(a) When a registrant in Class I-O is found acceptable for service after his armed forces physical examination or when such a registrant has failed to report for or to submit to armed forces physical examination, he shall, within ten days after notice of acceptability is mailed to him by the local board or within ten days after he has failed to report for or submit to armed forces physical examination, submit to the local board three types of civilian work contributing to the maintenance of the national health, safety, or interest as defined in section 1660.1,

which he is qualified to do and which he offers to perform in lieu of induction into the armed forces. If the local board deems any one of these types of work to be appropriate, it will order the registrant to perform such work, but such order shall not be issued prior to the time that the registrant would have been ordered to report for induction if he had not been classified in Class I-O, unless he has volunteered for such work.

"(b) If the registrant fails to submit to the local board types of work which he offers to perform, or if the local board finds that none of the types of work submitted by the registrant is appropriate, the local board shall submit to the registrant by letter three types of civilian work contributing to the maintenance of the national health, safety, or interest as defined in section 1660.1 which it deems appropriate for the registrant to perform in lieu of induction. The registrant, within ten days after such letter is mailed to him by the local board, shall file with the board a statement that he either offers to perform one of the types of work submitted by the board, or that he does not offer to perform any of such types of work. If the registrant offers to perform any one of the three types of work, he shall be ordered by the local board to perform such work in lieu of induction, but such order shall not be issued prior to the time that the registrant would have been ordered to report for induction if he had not been classified in Class I-O, unless he has volunteered for such work.

"(c) If the local board and the registrant are unable to agree upon a type of civilian work which should be performed by the registrant in lieu of induction, the State Director of Selective Service for the State in which the local board is located, or the representative of such State Director, appointed by him for the purpose, shall meet with the local board and the registrant and offer his assistance in reaching an agreement. The local board shall mail to the registrant a notice of the time and place of this meeting at least 10 days before the date of the meeting. If agreement

is reached at this meeting, the registrant shall be ordered by the local board to perform work in lieu of induction in accordance with such agreement, but such order shall not be issued prior to the time that the registrant would have been ordered to report for induction if he had not been classified in Class I-O, unless he has volunteered for such work.

"(d) If, after the meeting referred to in paragraph (c) of this section, the local board and the registrant are still unable to agree upon a type of civilian work which should be performed by the registrant in lieu of induction, the local board, with the approval of the Director of Selective Service, shall order the registrant to report for civilian work contributing to the maintenance of the national health, safety, or interest as defined in section 1660.1 which it deems appropriate, but such order shall not be issued prior to the time that the registrant would have been ordered to report for induction if he had not been classified in Class I-O, unless he has volunteered for such work."

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In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 266

ARMAND FRED HOEPKER, WALTER GAIL THOMAS AND EDWARD L. SMITH, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals (Pet. 13-18) has not yet been reported. The opinions in the district court are reported as follows: Hoepker (H.R. 74-79) at 126 F. Supp. 118; Thomas (T.R. 91-99) at 124 F. Supp. 411; Smith (S.R. 97-104) at 124 F. Supp. 406.[1]

[1] The three separate records will be here identified by the initial of each petitioner's name, thus: H.R., T.R., and S.R.

JURISDICTION

The judgments of the Court of Appeals were entered June 13, 1955 (Pet. 19-21). A petition for rehearing was denied July 14, 1955 (Pet. 22). The petition for writs of certiorari was filed July 26, 1955. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, under Section 6(j) of the Universal Military Training and Service Act, requiring a conscientious objector to perform "such civilian work contributing to the maintenance of the national health, safety, or interest as the local board may deem appropriate," a conscientious objector may be assigned to perform hospital work for (1) a state hospital, or (2) a non-profit, non-sectarian university clinic.

STATUTE AND REGULATIONS INVOLVED

The pertinent portions of the Universal Military Training and Service Act, 62 Stat. 604, as amended, 65 Stat. 75, provide:

Section 6(j) of the Act (50 U.S.C. App. 456(j)):

> * * * Any person claiming exemption from combatant training and service because of such conscientious objections whose claim is sustained by the local board shall, * * * if he is found to be conscientiously opposed to participation in such noncombatant service, in lieu of such induction, be ordered by his local board, subject to such regulations as the President may prescribe, to perform for a period

equal to the period prescribed in section 4(b) such civilian work contributing to the maintenance of the national health, safety, or interest as the local board may deem appropriate and any such person who knowingly fails or neglects to obey any such order from his local board shall be deemed, for the purposes of section 12 of this title, to have knowingly failed or neglected to perform a duty required of him under this title. * * * The Department of Justice shall, after such hearing, if the objections are found to be sustained, recommend to the appeal board that * * * if the objector is found to be conscientiously opposed to participation in such noncombatant service, he shall in lieu of such induction, be ordered by his local board, subject to such regulations as the President may prescribe, to perform for a period equal to the period prescribed in section 4(b) such civilian work contributing to the maintenance of the national health, safety, or interest as the local board may deem appropriate and any such person who knowingly fails or neglects to obey any such order from his local board shall be deemed, for the purposes of section 12 of this title, to have knowingly failed or neglected to perform a duty required of him under this title. * * *

Section 12(a) of the Act (50 U.S.C. App. 462(a)):

* * * Any * * * person * * * or who in any manner shall knowingly fail or neglect or re-

> fuse to perform any duty required of him under or in the execution of this title, or rules, regulations, or directions made pursuant to this title * * * shall, upon conviction in any district court of the United States of competent jurisdiction, be punished by imprisonment for not more than five years or a fine of not more than $10,000, or by both such fine and imprisonment * * *.

The pertinent Regulations, Sections 1660.1 and 1660.20 of the Selective Service Regulations (32 C.F.R. 1660.1, 1660.20) are set out in an Appendix to the Petition, pp. 25-28.

STATEMENT

Petitioners are all selective service registrants who were classified I-O, *i.e.*, conscientious objectors (H.R. 57-58; T.R. 59-60; S.R. 58). Hoepker and Thomas each refused to designate the types of civilian work he would perform, even after a meeting with the local board called in an attempt to work out an agreement (H.R. 58-62; T.R. 60-66). Hoepker was ordered to report for hospital work at the Manteno State Hospital (H.R. 69-70) and Thomas at the University of Chicago Clinics (T.R. 74-75). Each failed to do so (H.R. 70-72; T.R. 76). Smith designated his first choice as activity for the Watchtower Society and subsequent choices as work with state hospitals (S.R. 59-60). After being informed that the Watchtower Society was not an approved agency for employment of conscientious objectors (S.R. 61), he indicated he would accept no other

employment (S.R. 62). After a meeting with the local board at which he requested time to make a final decision (S.R. 64-65), but did not do so, he was ordered to report for work at the Kankakee State Hospital (S.R. 86-87). He reported but refused employment (S.R. 90-91).

Each petitioner was convicted of refusing to report for, or perform, civilian work (H.R. 72-73; T.R. 89; S.R. 104) and each was sentenced to imprisonment for two years (H.R. 73-74; T.R. 90; S.R. 104-105). On appeal, the judgments were affirmed (Pet. 19-21).

ARGUMENT

1. In attacking the validity of their assignments to civilian work, petitioners are for the most part raising issues which were before this Court on the petition for certiorari to review the judgment of the Court of Appeals for the Ninth Circuit in *Niles* v. *United States,* 220 F. 2d 278, certiorari denied, 349 U.S. 939. In the government's brief in opposition in that case, No. 719, O.T. 1954, the district court decisions in these cases, as well as the opinion of the Sixth Circuit in *Pomorski* v. *United States,* 222 F. 2d 106, as to which certiorari is also being sought (No. 267, this Term), were cited among numerous holdings in accord with *Niles* (see fn. 3, p. 7, of the brief in opposition in *Niles*).[2]

As was discussed in more detail in the brief in

[2] In addition to the cases cited in the *Niles* brief in opposition as in accord with the ruling in that case, see *United States* v. *Sutter,* 127 F. Supp. 109 (S.D. Cal.); *United States* v. *Messerman,* 128 F. Supp. 759 (M.D. Pa.); *United States* v. *Lebherz,* 129 F. Supp. 444 (D. N.J.).

opposition in *Niles,* neither the wording of the statute nor its legislative history supports petitioner's contention that the word "national" as used in Section 6(j) of the Selective Service Act, providing for assignment of conscientious objectors to "civilian work contributing to the maintenance of the national health, safety, or interest" requires that the work assignment be under the direction of a federal agency.

Section 6(j) shows on its face that the words "national health, safety, or interest" describe only the ultimate result or effect of the work to which conscientious objectors may be assigned. The phrase "civilian work" is the only statutory characterizaton of the employment relationships in which such work may be required. National health may be furthered by state or private profit organizations, as well as by federal agencies. It is a matter of common knowledge that, in this country, a major portion of the health needs of the nation are met by such agencies.

Petitioners also argue, as was argued in *Niles,* that since the work required of conscientious objectors under Section 5(g) of the 1940 Act was performed in camps under federal control, it must be assumed that Congress understood and intended that work required of conscientious objectors under the present Act should be performed only for federal agencies. The legislative history shows, however, that Congress believed that, under the present Act, there would not be a sufficient number of conscientious objectors to warrant the establishment of

a work camp system. 97 Cong. Rec. 6027. Congress thus contemplated the employment of conscientious objectors by existing agencies which contributed to the national health, safety, or interest. It must therefore have contemplated such work for state and private agencies to which such matters are for the most part entrusted.

Although admitting that conscientious objectors may be assigned to do some work, petitioners argue (Pet. 8-12) that the assignments here involved violate the Thirteenth Amendment and the due process clause in that assignments to a non-federal agency cannot be deemed the equivalent of military service. This argument ignores the fact that the work assignment must be to civilian work "contributing to the maintenance of the national health, safety, or interest." Work of that character manifestly contributes to the military preparedness and military strength of the nation. It is thus reasonable to require such work of persons who, through Congressional grace, are given exemption from their duty to perform military service. *United States* v. *Niles,* 122 F. Supp. 382 (N.D. Cal.), affirmed, 220 F. 2d 278 (C.A. 9), certiorari denied, 349 U.S. 939; *Pomorski* v. *United States,* 222 F. 2d 106 (C.A. 6), petition for certiorari pending No. 267, this Term; see also *Roodenko* v. *United States,* 147 F. 2d 752 (C.A. 10), certiorari denied, 324 U.S. 860.

2. The only aspect of the question which differs from that presented in *Niles* is that petitioner Thomas was assigned to work at the University of Chicago Clinics, a private rather than a state health

institution. It was shown that the University of Chicago is a non-sectarian, non-profit corporation, and that its clinics minister to patients without regard to race, creed, color or particular segment of the population; that the clinics conduct research on different diseases such as cancer and malaria, some of which are sponsored by the federal government (T.R. 80-83). The clinics thus contribute to "national health" just as does a state institution. Assignment to the clinic was therefore within the terms of the statute.

Petitioner relies upon *United States* v. *Copeland*, 126 F. Supp. 734 (D. Conn.) holding invalid an assignment to work for a charitable organization known as Goodwill Industries, Inc. In that decision, from which the government could not appeal since it was rendered in connection with a judgment of acquittal, the district court noted that many private charitable institutions had not completely lost the sectarian character of their origins, although the court apparently had some doubts as to the validity of a compulsory assignment to private employers generally. A contrary decision as to the same charity, Goodwill Industries, Inc., was rendered by the District Court for the Northern District of California in *United States* v. *Wilkinson*, Cr. 34388 (April 19, 1955). To the extent that the *Copeland* decision turns upon the possible sectarian character of the organization or the nature of the work to be performed, it is, as the court below pointed out (Pet. 16), inapplicable here where there was clear proof that the clinics to which peti-

tioner was assigned were non-sectarian in character. Moreover, in this case, there was proof that the clinics performed research work sponsored by the federal government of importance to national health. The institution, though private, thus had such a direct relation to national health as to bring it clearly within the intendment of Section 6(j).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for writs of certiorari should be denied.

SIMON E. SOBELOFF,
Solicitor General.

WARREN OLNEY III,
Assistant Attorney General.

BEATRICE ROSENBERG,
Attorney.

AUGUST, 1955.

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